The following Federal Trade Commission Rules of Practice were amended on September 26, 1996. 61 Federal Register 50430-31, 50640-51 (1996). This version of the amended rules was prepared by the agency's Office of General Counsel. Please note that this version is being provided for your convenience and that it does not constitute the official text of the agency's rules.

PART 2 -- NONADJUDICATIVE PROCEDURES

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§2.8 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust laws are being carried out, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Export Trade Act.

(b) Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

(c) Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. A copy of the transcript shall promptly be forwarded by the Commission investigator to the custodian designated in § 2.16.

[32 FR 8446, June 13, 1967, as amended at 45 FR 36342, May 29, 1980]

§2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony. Where the investigational hearing has been conducted pursuant to a civil investigative demand issued under section 20 of the

Federal Trade Commission Act, upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his testimony. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness unless the witnesss cannot be found, is ill, waives in writing his right to signature or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to review it, the Commission investigator shall take the actions prescribed by section 20(c)(12)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness. If the witness refuses to answer a question, then counsel may briefly state on the record if he has advised the witness not to answer the question and the legal grounds for such refusal.

(2) Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(3) Any objections made under the rules in this part will be treated as continuing objections and preserved throughout the further course of the hearing without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.

(4) Counsel for awitness may not, for any purpose or to any extent not allowed by paragraphs (b) (1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena or civil investigative demand must have been addressed to the Commission in advance of the hearing. Copies of such petitions may be filed as part of the record of the investigation with the person conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(5) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the investigational hearing to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the hearing

(6) The person conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Commission, acting pursuant to §4.1(e) of this chapter, will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission or exclusion from further participation in the particular investigation.

(18 U.S.C. 6002, 6004)

[32 FR 8446, June 13, 1967, as amended at 45 FR 36343, May 29, 1980; 45 FR 39244, June 10, 1980; 46 FR 26290, May 12, 1981; 50 FR 53304, Dec. 31, 1985]

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§2.15 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) The Bureau Director, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information granting immunity under title 18, section 6002, of the United States Code.

(b) The Commission retains the right to review the exercise of any of the functions delegated under paragraph (a) of this section. Appeals to the Commission from an order requiring a witness to testify or provide other information will be entertained by the Commission only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed fifteen (15) pages in length and shall be filed within five (5) days after notice of the complained of action. Answer to any such appeal may be filed within five (5) days after service of the appeal brief. The appeal shall not operate to suspend the hearing unless otherwise determined by the person conducting the hearing or ordered by the Commission.

(18 U.S.C. 6002, 6004)

[37 FR 5016, Mar. 9, 1972, as amended at 48 FR 41375, Sept. 15, 1983]

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§2.34 Disposition.

Upon receiving an executed agreement conforming with the requirements of § 2.32, the Commission may:

Accept it; reject it and issue its complaint; or take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein and any initial report of compliance submitted pursuant to § 2.33 on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby, and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the explanation in the Federal Register. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

[43 FR 51758, Nov. 7, 1978]

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PART 3 -- RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

§ 3.11A Fast Track Proceedings.

(a) Availability of Fast Track Proceedings. In certain administrative proceedings that have been designated by the Commission as appropriate for the fast track schedule, respondents may elect to have the proceeding adjudicated under the expedited schedule set forth in this section. In administrative proceedings involving multiple respondents, the fast track schedule shall be available only if all respondents elect it. The Commission shall designate whether the fast track schedule will be available at the time it authorizes Commission staff to seek a preliminary injunction in federal district court and shall provide notice of the defendant's option to elect the fast track procedures in the event that the Commission should initiate an administrative adjudication challenging some or all of the same conduct at issue in the federal court injunctive proceeding. Such notice shall be provided to the prospective respondent at the time it is notified of the Commission's action to authorize the filing of the preliminary injunction motion. In fast track proceedings, the Commission shall be prepared to issue a final order and opinion within thirteen (13) months after the latest of the following events (*hereinafter* "triggering event"): issuance of the Commission's administrative complaint; entry of a preliminary injunction by a federal court in a collateral proceeding against respondent brought by the Commission; or the date on which respondent elects the fast track procedure. The date for issuance of the Commission's final order and opinion in fast track proceedings may be amended by the Commission in the

following circumstances: if the Commission's final order or opinion contains material or information designated for *in camera* treatment such that the agency is required to provide advance notification of such disclosure to submitters of *in camera* material or information; or if the Commission determines that adherence to the thirteen-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of the fast track proceeding. Only administrative proceedings challenging conduct that has been preliminarily enjoined by a federal court in a collateral proceeding brought by the Commission shall be subject to the fast track schedule. In the event the preliminary injunction in the collateral federal court proceeding is vacated, the Commission, in its discretion, may take such action as it deems appropriate in the administrative adjudication. Except as modified by this section, the rules contained in Subparts A through I of Part 3 of this chapter shall govern fast track procedures in adjudicative proceedings.

(b) Election of Fast Track Proceedings. Respondents making an election under this section shall make such election by the later of either: three (3) days after service of the administrative complaint challenging the merger or acquisition; or three (3) days after a federal district court grants the Commission's request for a preliminary injunction. Respondents electing fast track proceedings shall do so by filing a notice of election of such expedited proceedings with the Secretary.

(c) Interim Deadlines in Fast Track Proceedings. The following deadlines shall govern all fast track proceedings covered by this section:

(1) The scheduling conference required by § 3.21(b) shall be held not later than three (3) days after the triggering event.

(2) Respondent's answer shall be filed within fourteen (14) days after the triggering event.

(3) The ALJ shall file an initial decision within fifty-six (56) days following the conclusion of the evidentiary hearing. The initial decision shall be filed no later than one hundred ninety-five (195) days after the triggering event, pursuant to paragraph (a) of this section.

(4) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three (3) days after service of the initial decision. The notice shall comply with § 3.52(a) in all other respects.

(5) The appeal shall be in the form of a brief, filed within twenty-one (21) days after service of the initial decision, and shall comply with § 3.52(b) in all other respects.

(6) Within fourteen (14) days after service of the appeal brief, the appellee may file an answering brief which shall comply with § 3.52(c). Cross-appeals, as permitted in § 3.52(c), may not be raised in an appellee's answering brief. All issues raised on appeal must be presented in the

party's appeal brief and must be filed within the deadline specified in paragraphs (c)(4) and (c)(5) of this section.

(7) Within five (5) days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with § 3.52(d) in all other respects.

(d) Discovery. Discovery shall be governed by Subpart D of this part. The ALJ may establish limitations on the number of depositions, witnesses, or any document production, pursuant to his plenary authority under § 3.42(c)(6).

§ 3.12 Answer to complaint.

(a) Time for filing. A respondent shall file an answer within twenty (20) days after being served with the complaint: Provided, however, That the filing of a motion for a more definite statement of the charges shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or thirty (30) days after service of the complaint, whichever is later;

(2) If the motion is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

(b) Content of answer. An answer shall conform to the following:

(1) If allegations of complaint are contested. An answer in which the allegations of a complaint are contested shall contain:

(I) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) If allegations of complaint are admitted. If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the

respondent may, however, reserve the right to submit proposed findings and conclusions under §3.46 and the right to appeal the initial decision to the Commission under §3.52.

(c) Default. Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

[32 FR 8449, June 13, 1967, as amended at 50 FR 53305, Dec. 31, 1985]

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§3.21 Prehearing procedures.

(a) Meeting of the parties before scheduling conference. As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to agree, if possible, on a proposed discovery schedule, a preliminary estimate of the time required for the hearing, and a proposed hearing date, and on any other matters to be determined at the scheduling conference.

(b) Scheduling conference. Not later than seven (7) days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) Prehearing scheduling order. (1) Not later than two (2) days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference and of the evidentiary hearing.

(2) The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on ex parte motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) Meeting prior to final prehearing conference. Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) Final prehearing conference. As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) Additional prehearing conferences and orders. The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the orderly and expeditious disposition of a proceeding. Such conferences shall be held in person to the extent practicable.

(g) Public access and reporting. Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

[50 FR 41487, Oct. 11, 1985]

§3.22 Motions.

(a) Presentation and disposition. During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under § 3.26, § 3.42(g), or § 4.17, shall be addressed to and ruled upon, if within his or her authority, by the Administrative Law Judge. The Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments. The Commission may order the ALJ to submit a recommendation or an amplification thereof. Rulings or recommendations containing information granted in camera status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor. If a party includes in a motion information that has been granted in

camera status pursuant to §3.45(b), the party shall file two versions of the motion in accordance with the procedures set forth in §3.45(e). The time period specified by §3.22(c) within which an opposing party may file an answer will begin to run upon service on that opposing party of the in camera version of a motion.

(c) Answers. Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted in camera status pursuant to §3.45(b), the opposing party shall file two versions of the answer in accordance with the procedures set forth in §3.45(e). The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) Motions for extensions. The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(e) Rulings on motions for dismissal. When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record, in accordance with the procedures set forth in paragraph (a) of this section, and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge may defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

(f) Statement. Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[32 FR 8449, June 13, 1967, as amended at 50 FR 42672, Oct. 22, 1985; 52 FR 22293, June 11, 1987; 60 FR 39641, Aug. 3, 1995]

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§3.24 Summary decisions.

(a) Procedure. (1) Any party to an adjudicatory proceeding may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no genuine issue. Counsel in support of the complaint may so move at any time after twenty (20) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in § 3.24(a)(3). The Administrative Law Judge may, in his discretion, set the matter for oral argument and call for the submission of briefs or memoranda. If a party includes in any such brief or memorandum information that has been granted in camera status pursuant to §3.45(b), the party shall file two versions of the document in accordance with the procedures set forth in §3.45(e). The decision sought by the moving party shall be rendered within thirty (30) days if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law. Any such decision shall constitute the initial decision of the Administrative Law Judge and shall accord with the procedures set forth in §3.51(c). A summary decision, interlocutory in character and in compliance with the procedures set forth in §3.51(c), may be rendered on the issue of liability alone although there is a genuine issue as to the nature and extent of relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Administrative Law Judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the Administrative Law Judge may refuse the application for summary decision or may order a continuance to permit

affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Administrative Law Judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) Affidavits filed in bad faith. (1) Should it appear to the satisfaction of the Administrative Law Judge at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Administrative Law Judge shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Administrative Law Judge concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in §3.42(d). If the Administrative Law Judge concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b) (1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the examiner shall certify the matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

[35 FR 5007, Mar. 24, 1970, as amended at 50 FR 53305, Dec. 31, 1985; 52 FR 22293, June 11, 1987]

§3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Such motion shall be filed with the Secretary of the Commission, as provided in § 4.2. Any such motion shall be accompanied by a proposed consent agreement containing a proposed order executed by one or more respondents and conforming to the requirements of §2.32; the proposed consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the proposed consent agreement affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this subsection shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If the proposed consent agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section.

(d) If the proposed consent agreement accompanying the motion has not been executed by complaint counsel, the Administrative Law Judge may certify the motion and agreement to the Commission together with his recommendation if he determines, in writing, that there is a likelihood of settlement. The filing of a motion under this subsection and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. Upon certification of a motion pursuant to this subsection, the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve, for the purpose of considering the proposed consent agreement.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraph (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After the matter has been withdrawn from adjudication, in whole or in part, the Commission may:

(1) Accept the proposed consent agreement,

(2) Reject it and return to adjudication for further proceedings any portion of the matter previously withdrawn from adjudication, or

(3) Take such other action as it may deem appropriate.

If a proposed consent agreement is accepted, the Commission will place it on the public record, together with any initial report of compliance submitted pursuant to § 2.33, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby, and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the explanation in the Federal Register. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the parties, in which event it will return the affected portions of the matter to adjudication for further proceedings or take such other action as it may consider appropriate, or issue and serve its decision.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

[40 FR 15236, Apr. 4, 1975, as amended at 42 FR 39659, Aug. 5, 1977; 43 FR 51758, Nov. 7, 1978; 50 FR 53305, Dec. 31, 1985; 54 FR 18885, May 3, 1989]

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§3.31 General provisions.

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) Initial disclosures. Complaint counsel and respondent's counsel shall, within five (5) days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) the name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1);

(2) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are privileged as defined in § 3.31(c)(2), pertain to hearing preparation as defined in § 3.31(c)(3), pertain to experts as defined in § 3.31(c)(4), or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

(c) Scope of discovery.

(1) In general; limitations. Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other

tangible things and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden and expense of the proposed discovery outweigh its likely benefit.

(2) Privilege. The Administrative Law Judge may enter a protective order denying or limiting discovery to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) Hearing preparation: Materials. Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(4) Hearing preparation: Experts. (i) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for hearing, may be obtained only as follows:

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Administrative Law Judge may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. § 3109 unless the parties have stipulated a higher amount, for time spent in responding to discovery under paragraphs (c)(4)(i)(B) and (c)(4)(ii) of this section.

(d) Protective orders; orders to preserve evidence.(1) The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(2) [Reserved]

(e) Supplementation of disclosures and responses. A party who has made an initial disclosure under § 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

(f) Stipulations. When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(g) Ex parte rulings on applications for compulsory process. Applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to § 3.34 may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the Administrative Law Judge or the Commission.

[43 FR 56864, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

* * *

§3.33 Depositions.

(a) In general. Any party may take a deposition of a named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1). Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them.

(b) [Reserved]

(c) Notice to corporation or other organization. A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. If such deposition is ordered and subpoena issued, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(d) Taking of deposition. Each deponent shall be duly sworn, and any party shall have the right to question him. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the deposition to the deponent and to any party.

(e) Depositions upon written questions. A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of Rule 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) Correction of deposition. A deposition may be corrected, as to form or substance, in the manner provided by §3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under Rule 3.33(g)(3)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his remarks, stating with specificity the alleged errors in the transcript.

(g)(1) Use of depositions in hearings. At the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) Any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(ii) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose.

(iii) A deposition may be used by any party for any purpose if the Administrative Law Judge finds:

(A) That the deponent is dead; or

(B) That the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition; or

(C) That the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(iv) If only partof a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced.

(2) Objections to admissibility. Subject to the provisions of paragraph (g)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) Effect of errors and irregularities in depositions- (i) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the

taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) As to taking of deposition. (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(iv) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

[43 FR 56865, Dec. 4, 1978]

§3.34 Subpoenas.

(a) Subpoenas ad testificandum. (1) Prehearing. The Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service.

(2) Hearing. Application for issuance of a subpoena commanding a person to attend and give testimony at an adjudicative hearing shall be made in writing to the Administrative Law Judge. Such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) Subpoenas duces tecum; subpoenas to permit inspection of premises. The Secretary of the Commission, upon request of a party, shall issue a subpoena, signed but otherwise in blank, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be

produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term "documents" includes writings, drawings, graphs, charts, handwritten notes, film, photographs, audio and video recordings and any such representations stored on a computer, a computer disk, CD-ROM, magnetic or electronic tape, or any other means of electronic storage, and other data compilations from which information can be obtained in machine-readable form (translated, if necessary, into reasonably usable form by the person subject to the subpoena). A subpoena duces tecum may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) Motions to quash; limitation on subpoenas to other government agencies. Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by Rule 3.22(f). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas requiring the appearance of, or the production of documents in the possession, custody, or control of, an official or employee of a governmental agency other than the Commission, which may be authorized only in accordance with § 3.36.

[43 FR 56866, Dec. 4, 1978, as amended at 50 FR 42672, Oct. 22, 1985]

§3.35 Interrogatories to parties.

(a) Availability; Procedures for Use. (1) Any party may serve upon any other party written interrogatories, not exceeding twenty-five (25) in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within thirty (30) days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time.

(b) Scope; use at hearing. (1) Interrogatories may relate to any matters that can be inquired into under § 3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to produce records. Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[43 FR 56867, Dec. 4, 1978]

§3.36 Applications for subpoenas for records, or appearances by officials or employees, of governmental agencies other than the Commission.

(a) Form. An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a subpoena requiring access to documents or other tangible things, for the purposes described in § 3.37(a), in the possession, custody, or control of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of an official or employee of another governmental agency, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) Content. The motion shall satisfy the same requirements for a subpoena under § 3.34 or a request for production or access under § 3.37, together with a specific showing that: (1) the material sought is reasonable in scope; (2) if for purposes of discovery, the material falls within the limits of discovery under §3.31(b)(1), or, if for an adjudicative hearing, the material is reasonably relevant; and (3) the information or material sought cannot reasonably be obtained by other means.

[43 FR 56867, Dec. 4, 1978]

§3.37 Production of documents and things; access for inspection and other purposes.

(a) Availability; procedures for use. Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of § 3.31(c)(1) and in the possession, custody or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34.

(b) Response; objections. The response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

[43 FR 56867, Dec. 4, 1978, as amended at 50 FR 42672, Oct. 22, 1985; 50 FR 53305, Dec. 31, 1985]

§3.38 Motion for order compelling disclosure or discovery; sanctions.

(a) Motion for order to compel. A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, or an interrogatory under § 3.35.

(1) Initial disclosures; requests for admission; depositions; interrogatories. Unless the objecting party sustains its burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served or disclosure otherwise be made. If the Adminis

trative Law Judge determines that an answer or other response by the objecting party does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer or response be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(2) Requests for production or access. If a party fails to respond to or comply as requested with a request for production or access made under § 3.37(a), the discovering party may move for an order to compel production or access in accordance with the request.

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to

comply with a subpoena or order, he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

[43 FR 56867, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

§3.38A Withholding requested material.

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34, written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material for reasons described in §3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

[44 FR 54043, Sept. 18, 1979]

* * *

§3.43 Evidence.

(a) Burden of proof. Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to § 3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) Admissibility; exclusion of relevant evidence; mode and order of interrogation and presentation. Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) make the interrogation and presentation effective for the ascertainment of the truth,

(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.

(c) Information obtained in investigations. Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

(d) Official notice. When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) Objections. Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(f) Exceptions. Formal exception to an adverse ruling is not required.

(g) Excluded evidence. When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

[32 FR 8449, June 13, 1967; 32 FR 8711, June 17, 1967, as amended at 48 FR 44766, Sept. 30, 1983]

§3.44 Record.

(a) Reporting and transcription. Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) Corrections. Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by

the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

(c) Closing of the hearing record. Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in§ 3.44(b).

§3.45 In camera orders.

(a) Definition. Except as hereinafter provided, material made subject to an in camera order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such in camera material to the extent necessary for the proper disposition of the proceeding.

(b) In camera treatment of material. The Administrative Law Judge may order material, or portions thereof, offered into evidence, whether admitted or rejected, to be placed in camera on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their in camera treatment. This finding shall be based on the standard articulated in H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961); see also Bristol-Myers Co., 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by General Foods Corp., 95 F.T.C. 352, 355 (1980). No material, or portion thereof offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which in camera treatment will expire, and including:

(1) A description of the material;

(2) A statement of the reasons for granting in camera treatment; and

(3) A statement of the reasons for the date on which in camera treatment will expire. Such expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is

entitled to in camera treatment for an indeterminate period. Any party desiring, in connection with the preparation and presentation of the case, to disclose in camera material to experts, consultants, prospective witnesses, or witnesses, shall make application to the Administrative Law Judge setting forth the justification therefor. The Administrative Law Judge, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. Material subject to an in camera order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation ``In Camera Record under §3.45," and the date, if any, on which in camera treatment expires.

(c) Release of in camera material. In camera material constitutes part of the confidential records of the Commission and is subject to the provisions of §4.11 of this chapter.

(d) Briefs and other submissions referring to in camera information. Parties shall not disclose information that has been granted in camera status pursuant to §3.45(b) in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to in camera information or general statements based on the content of such information.

(e) When in camera information is included in briefs and other submissions. If a party includes specific information that has been granted in camera status pursuant to §3.45(b) in any document filed in a proceeding under this part, the party shall file two versions of the document. A complete version shall be marked ``In Camera" on the first page and shall be filed with the Secretary and served upon the parties in accordance with the rules in this part. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked ``Public Record" on the first page and omitting the in camera information that appears in the complete version, shall be filed with the Secretary within five days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served upon the parties. The expurgated version shall indicate any omissions with brackets or elipses.

(f) When in camera information is included in rulings or recommendations of the Administrative Law Judge. If the Administrative Law Judge includes in any ruling or recommendation information that has been granted in camera status pursuant to § 3.45(b), the Administrative Law Judge shall file two versions of the ruling or recommendation. A complete version shall be marked "In Camera" on the first page and shall be served upon the parties. The complete version will be placed in the in camera record of the proceeding. An expurgated version, to be filed within five (5) days after the filing of the complete version, shall omit the in camera information that appears in the complete version, shall be marked "Public Record" on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

[32 FR 8449, June 13, 1967, as amended at 52 FR 22293, June 11, 1987; 60 FR 37748, July 21, 1995]

§3.46 Proposed findings, conclusions, and order.

(a) General. Upon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted in camera status pursuant to §3.45(b), the party shall file two versions of the proposals in accordance with the procedures set forth in §3.45(e).

(b) Exhibit Index. The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence:

(1) The exhibit number, followed by

(2) The exhibit's title or a brief description if the exhibit is untitled;

(3) The transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made;

(4) The transcript pages at which the exhibit is discussed;

(5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;

(6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and

(7) A statement whether the exhibit has been accorded in camera treatment.

(c) Witness Index. The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness:

(1) The name of the witness;

(2) A brief identification of the witness;

(3) The transcript pages at which any testimony of the witness appears; and

(4) A statement identifying any portion of the witness' testimony that was received in camera.

(d) Stipulated indices. As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of proposed findings of fact and conclusions of law is due to be filed.

(e) Rulings. The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

[48 FR 56945, Dec. 27, 1983, as amended at 52 FR 22294, June 11, 1987]

* * *

§3.51 Initial decision.

(a) When filed and when effective. The Administrative Law Judge shall file an initial decision within ninety (90) days after closing the hearing record pursuant to §3.44(c), or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge. In no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days. Such extension, upon its expiration, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. The pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision. The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding. Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) Exhaustion of administrative remedies. An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial

decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) Content. (1) The initial decision shall include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f).

(2) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(3) An initial decision shall be based upon a consideration of the whole record relevant to the issues decided pursuant to paragraph (c)(1) of this section, and it shall be supported by reliable, probative and substantial evidence.

(d) By whom made. The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he shall have become unavailable to the Commission.

(e) Reopening of proceeding by Administrative Law Judge; termination of jurisdiction. (1) At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

[32 FR 8449, June 13, 1967, as amended at 35 FR 10656, July 1, 1970; 44 FR 62887, Nov. 1, 1979; 48 FR 52576, Nov. 21, 1983; 48 FR 54810, Dec. 7, 1983; 52 FR 22294, June 11, 1987]

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§3.55 Reconsideration.

Within fourteen (14) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission. Any party desiring to oppose such a petition

shall file an answer thereto within ten (10) days after service upon him of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

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PART 4 -- MISCELLANEOUS RULES

§4.2 Requirements as to form, and filing of documents other than correspondence.

(a) Filing. (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; Provided, however, That in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the appropriate Director, Deputy Director, Associate Director in the Bureau of Consumer Protection, or Assistant Director in the Bureau of Competition or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings shall, at or before the time of filing, be served by the party filing the documents or person acting for that party on all other parties pursuant to §4.4.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) Title. Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) Copies. An original and twenty (20) copies of all documents before the Commission and motions for an Administrative Law Judge's certification of an interlocutory appeal pursuant to §3.23(b) shall be filed; an original and ten (10) copies of all other documents before the Administrative Law Judge shall be filed; and an original and one (1) copy of compliance reports shall be filed. Only one (1) copy of admissions and answers thereto must be filed with the Secretary, the originals to be served on the opposing party as specified in §3.32. With respect to motions under § 3.22, the moving party shall provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(d) Form. (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by §3.52(e).

(3) If printed, documents shall be on good unglazed paper seven (7) inches by ten (10) inches. The type shall not be less than ten (10) point adequately leaded. Citations and quotations shall not be less than ten (10) point single leaded, and footnotes shall not be less than eight (8) point single leaded. The printed line shall not exceed four and three-quarter (4\3/4\) inches in length.

(4) If typewritten, documents shall be on paper not less than eight (8) inches nor more than eight and one-half (8\1/2\) inches by not less than ten and one-half (10\1/2\) inches nor more than eleven (11) inches.

(5) All documents must be bound on the left side. Except for printed documents, the left margin of each page must be at least one and one-half (1\1/2\) inches and the right margin at least one (1) inch.

(e) Signature. (1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association. In addition, motions filed pursuant to §3.22 shall include the name, address, and telephone number of counsel.

(2) Signing a document constitutes a representation by the signer that he has read it, that to the best of his knowledge, information, and belief, the statements made in it are true, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

[32 FR 8456, June 13, 1967, as amended at 40 FR 59725, Dec. 30, 1975; 42 FR 30150, June 13, 1977; 45 FR 36344, May 29, 1980; 47 FR 7826, Feb. 23, 1982; 48 FR 41376, Sept. 15, 1983; 50 FR 28097, July 10, 1985]